

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEFFREY L. BUTLER, Jr.	:	Case No. 1:17-CV-604
	:	
Plaintiff,	:	Judge Michael R. Barrett
	:	
v.	:	
	:	
CITY OF CINCINNATI, et al.,	:	DEFENDANTS' MEMORANDUM
	:	OPPOSING PLAINTIFF'S MOTION
	:	TO AMEND THE SECOND
Defendants.	:	AMENDED COMPLAINT

Defendants City of Cincinnati ("City"); John Cranley, Mayor; Harry Black, City Manager; and Sheila Hill-Christian, Assistant City Manager ("Individual Defendants") (collectively, "City Defendants") oppose Plaintiff's Motion to Amend the Second Amended Complaint (Doc 37).

This lawsuit was initiated in September of 2017 (Doc 1) and amended for the first time one month later (Doc 5). The City first moved this Court to dismiss the lawsuit a little over one year ago (Doc 13) because Plaintiff's claims lack merit and are legally deficient. In February 2018, the Court heard oral argument on the City's motion; however, just a few months later came Plaintiff's next request to amend his complaint (Doc 22). Again, Plaintiff's claims lacked merit and are legally deficient, so the City Defendants moved the Court to dismiss the lawsuit in July (Doc 31). That motion was fully briefed in August (Doc 36). But now, over a year after first filing this lawsuit, Plaintiff yet again moves to amend his complaint, this time to add a claim of spoliation of evidence (Doc 37).

The City Defendants recognize that Federal Rule of Civil Procedure 15(a) states that motions to amend shall be freely given, and that the Court has a duty to consider Plaintiff's request. *Thompson v. Superior Fireplace Co.*, 931 F.2d 372 (6th Cir. 1991).

However, Plaintiff's motion is futile because his claims lack merit. First, all of the claims that were made in the Second Amended Complaint should be dismissed for the reasons explained in the City's Motion and Reply in Support (Docs 31 and 36).

Second, Plaintiff's added claim also fails to state a claim upon which relief should be granted. "Spoliation is 'the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.' The spoliation of evidence germane 'to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.'" *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212, 216, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y. 2003). Plaintiff's claim for spoliation does not explain how the documents in the allegedly missing box are evidence in this lawsuit except for a conclusory statement that they are (Doc 37, Ex. A at ¶¶ 183-184). Importantly, Plaintiff's claims concerning the audit depend on whether he was engaged in protected First Amendment speech, not whether the conclusions he reached in the audit were correct. Because the allegedly missing documents have no relevance as to whether he was engaged in protected conduct, they cannot form the basis for a proper spoliation claim.

In conclusion, the Court should deny Plaintiff's Motion to Amend the Second Amended Complaint because the amendment is futile.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and copies will be mailed to those parties who are not served via the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Emily E. Woerner
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